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One of the legacies of *Brown v. Board of Education* is its endorsement of affirmative remedial action to enforce constitutional rights.[1] In the companion cases of *Brown I* and *Brown II*, the United States Supreme Court rejected mere declaratory or prohibitory relief in favor of a mandatory injunction that would compel the constitutionally-required change.[2] Disputes over the parameters of this active remedial power and compliance with the ordered remedies have dominated the ensuing decades of post-*Brown* school desegregation cases.[3] These enforcement

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1. *See* RICHARD H. FALLON, JR. ET AL., THE FEDERAL COURTS AND THE FEDERAL SYSTEM 803 (5th ed. 2003) ("[A]t least since Brown v. Board of Education . . . injunctive remedies for constitutional violations have become the rule."); Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585, 588 (1983) ("The contemporary character and potency of the injunction emerged . . . beginning with *Brown v. Board of Education* . . . ."). *See generally* OWEN M. FISS, THE CIVIL RIGHTS INJUNCTION (1978); Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979) [hereinafter Fiss, *Justice*].

2. Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954) (*Brown I*); Brown v. Bd. of Educ., 349 U.S. 294, 299, 301 (1955) (*Brown II*) (rejecting a remedy that would simply prohibit the racial assignment of students in the schools and requiring the affirmative "transition to a system of public education freed of racial discrimination . . . with all deliberate speed").

3. *See, e.g.*, Missouri v. Jenkins, 515 U.S. 70, 98–100 (1995) (invalidating an injunction mandating magnet schools and teacher salary increases to attract white students to desegregate schools); Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406, 417 (1977) (overturning order of systemwide restructuring of school system as not justified

disputes have overshadowed the importance of *Brown*'s establishment of a remedial norm embracing affirmative judicial action to provide meaningful relief. This Article seeks to salvage that remedial norm by grounding it in the Due Process Clause of the Fourteenth Amendment. Arguing that the right to a remedy is a fundamental right, this Article suggests that a strict scrutiny calculus must be used to justify the denial of a remedy.

Disputes over remedies provide a convenient way for dissenters to resist conformance to legal guarantees.[4] Courts can declare rights, but then default in the remedy to avoid a politically unpopular result. The same pull and tug of *Brown*'s remedial norm seen in the desegregation cases is present today in the school funding cases.[5] While plaintiffs generally have been successful in these cases challenging the financial disparities between poor and rich school districts, "[w]inning the case has not been the same as winning the remedy."[6] Defendants continue to balk at declarations of unconstitutional behavior, and courts struggle with the proper scope of their remedial power.[7] One important consequence

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by three isolated incidents of discrimination); Milliken v. Bradley, 433 U.S. 267, 287–88 (1977) (upholding court's remedial authority to order educational programs for school children to remedy effects of past segregation); Milliken v. Bradley, 418 U.S. 717, 744–47 (1974) (invalidating interdistrict remedy bussing children in the defendant city schools to outlying suburbs); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15–29 (1971) (upholding court's remedial authority to impose injunctive order requiring redrawing of school zones, bussing of students, and population ratios); Cooper v. Aaron, 358 U.S. 1, 15–16 (1958) (denying defendants' request to delay implementation of ordered school desegregation because of financial burden and violent resistance to order).

4. Frank H. Easterbrook, *Civil Rights and Remedies*, 14 HARV. J.L. & PUB. POL'Y 103, 103 (1991) ("Most disputes over remedies in civil rights cases have nothing to do with remedies and everything to do with substantive entitlements."); Gewirtz, *supra* note 1, at 593 n.16 ("Criticism of a remedy, therefore, may reflect criticism of the underlying right.").

5. *See* Molly S. McUsic, *The Future of* Brown v. Board of Education*: Economic Integration of the Public Schools*, 117 HARV. L. REV. 1334, 1335, 1342 (2004) (discussing the school funding cases and efforts to equalize education spending as the "indirect descendants" or "cousins" of *Brown*); Quentin A. Palfrey, *The State Judiciary's Role in Fulfilling* Brown*'s Promise*, 8 MICH. J. RACE & L. 1 (2002) (applying the lessons of the past five decades of education reform litigation since *Brown* to third wave school funding cases based on state constitutional provisions).

6. McUsic, *supra* note 5, at 1347.

7. *See* Campaign for Fiscal Equity, Inc. v. State, 801 N.E.2d 326, 345 (N.Y. 2003):

> [I]t is the province of the Judicial branch to define, and safeguard, rights provided by the New York State Constitution, and order redress for violation of them. Surely there is a remedy more promising, and ultimately less entangling for the courts, than simply directing the parties to eliminate deficiencies, as the State would have us do.

E.g., Tenn. Small Sch. Sys. v. McWherter, 91 S.W.3d 232, 233 (Tenn. 2002); DeRolph v. State, 754 N.E.2d 1184, 1201 (Ohio 2001) (*DeRolph III*); Abbott v. Burke, 575 A.2d 359, 385–91 (N.J. 1990); Rose v. Council for Better Educ., 790 S.W.2d 186, 214–15 (Ky. 1989).

of anchoring *Brown*'s remedial norm in the Due Process Clause would be to counter situations like that of the school funding cases where courts have avoided the issuance of meaningful remedies.

A case in point is the saga of *DeRolph v. State*.[8] In 1997, the Ohio Supreme Court found that the state's system of funding public schools primarily on the basis of local property taxes violated the Ohio Constitution's guarantee of a "thorough and efficient system of common schools."[9] To address the systemic violation, the Ohio court issued an affirmative, structural injunction requiring the General Assembly to "fix the system" and "undergo a complete systematic overhaul" to "create an entirely new school financing system" consistent with the Ohio Constitution.[10] In a second 2000 decision, the court clarified the meaning of a "thorough and efficient" education system and repeated its injunctive command that the state legislature undertake a "complete systematic overhaul" of the school funding system.[11] The State of Ohio, however, failed to respond to the judicial order. In frustration, the Ohio Supreme Court commanded specific funding levels; but when the state protested the high amounts of this funding, the court referred the case to mediation.[12] When mediation failed, the Ohio Supreme Court in 2002 reaffirmed its original structural injunction:

> [T]he General Assembly has not focused on the core constitutional directive of *DeRolph I*: "a complete systematic overhaul" of the school-funding system. Today we reiterate that that is what is needed, not further nibbling at the edges. Accordingly, we direct the General Assembly to enact a school-funding scheme that is thorough and efficient.[13]

Then in 2003, the Ohio Supreme Court abruptly issued a writ of prohibition preventing the trial court from enforcing the injunctive

8. DeRolph v. State, 677 N.E.2d 733 (Ohio 1997) (*DeRolph I*); DeRolph v. State, 678 N.E.2d 886 (Ohio 1997); DeRolph v. State, 728 N.E.2d 993 (Ohio 2000) (*DeRolph II*); *DeRolph III*, 754 N.E.2d at 1184; DeRolph v. State, 758 N.E.2d 1113 (Ohio 2001); DeRolph v. State, 780 N.E.2d 529 (Ohio 2002) (*DeRolph IV*); State *ex rel.* State v. Lewis, 789 N.E.2d 195 (Ohio 2003) (*DeRolph V*).

9. *DeRolph I*, 677 N.E.2d at 747; *see* OHIO CONST. art. VI, § 2.

10. *DeRolph I*, 677 N.E.2d at 747.

11. *DeRolph II*, 728 N.E.2d at 993.

12. *DeRolph III*, 754 N.E.2d at 1201; *DeRolph*, 758 N.E.2d at 1114–16; *see* Molly Townes O'Brien, *At the Intersection of Public Policy and Private Process: Court-Ordered Mediation and the Remedial Process in School Funding Litigation*, 18 OHIO ST. J. ON DISP. RESOL. 391, 413–17 (2003).

13. *DeRolph IV*, 780 N.E.2d at 530 (quoting *DeRolph I*, 677 N.E.2d at 747).

decrees.[14] After twelve years of litigation and six years of ordered and expected systemic relief, the Ohio court simply abandoned all remedial mechanisms needed to effectuate the state's actual compliance with the constitution.

Thus, it may be true, as others have argued that, since the time of *Brown*, institutional defendants have won the remedial battle.[15] Defendants have learned that delay and defiance of court orders work. The United States Supreme Court has adopted a standard for ordering injunctive relief that significantly defers to defendant wrongdoers at the plaintiffs' expense.[16] And epithets of "activist courts" and "judicial legislation" have colored the existing scholarship and portrayed affirmative structural remedies as an illegitimate and excessive use of judicial power.[17]

This Article attempts to swing the pendulum in the other direction by suggesting that remedial action like that of *Brown* and its progeny is not only acceptable, but indeed, required judicial action. It argues that a remedy is more than a legal maxim. Rather, this Article argues that the right to a meaningful remedy is a fundamental right protected by the Due Process Clause of the Fourteenth Amendment.[18] Stated simply: *Ubi jus*, *ibi remedium.* Where there's a right, there must be a remedy.[19]

I. THE RIGHT TO A REMEDY IS A FUNDAMENTAL RIGHT

The due process guarantees in the federal constitution protect fundamental rights against arbitrary abridgement.[20] The right to a

14. *DeRolph V*, 789 N.E.2d at 200, 203.

15. *See* Barry Friedman, *When Rights Encounter Reality: Enforcing Federal Remedies*, 65 S. CAL. L. REV. 735, 740 (1992) ("[T]he Court's decisions regarding enforcement of remedies tolerates 'channeled defiance' of federal court remedial orders."); Wendy Parker, *The Decline of Judicial Decisionmaking: School Desegregation and District Court Judges*, 81 N.C. L. REV. 1623, 1628–29 (2003) [hereinafter Parker, *School Desegregation Judges*]; Wendy Parker, *The Supreme Court and Public Law Remedies: A Tale of Two Kansas Cities*, 50 HASTINGS L.J. 475, 552 (1999) [hereinafter Parker, *Public Law Remedies*].

16. Parker, *School Desegregation Judges*, *supra* note 15, at 1623; Parker, *Public Law Remedies*, *supra* note 15, at 475.

17. *E.g.*, Dickerson v. United States, 530 U.S. 428, 465 (2000) (Scalia, J., dissenting) (criticizing the imposition of a "Court-made code" upon Congress and the states); John Choon Yoo, *Who Measures the Chancellor's Foot? The Inherent Remedial Authority of the Federal Courts*, 84 CAL. L. REV. 1121 (1996) (arguing that structural and prophylactic injunctions violate principles of judicial restraint).

18. I presented this argument to the United States Supreme Court in an amicus brief written in support of certiorari in the Ohio school funding case of *DeRolph v. Ohio.* Brief of Amici Curiae Ohio School Board Association, et. al. at 5–11, DeRolph v. Ohio, 124 S. Ct. 432 (2003) (No. 03-245). The Court denied certiorari in the case. 124 S. Ct. 432.

19. 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 23 (Dawsons of Pall Mall 1966) (1768).

20. The Fourteenth Amendment provides that no State shall "deprive any person person of life, liberty, or property, without due process of law." We have long

remedy is one of these fundamental rights historically recognized in our legal system as central to the concept of ordered liberty.[21] "The principle that rights must have remedies is ancient and venerable."[22] In 1703, the right to a remedy was expressly recognized in Anglo-American law. In *Ashby v. White*, the Chief Justice of the King's Bench stated:

> If the plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment of it; and indeed it is a vain thing to imagine a right without a remedy; for . . . want of right and want of remedy are reciprocal. . . . Where a man has but one remedy to come at his right, if he loses that he loses his right.[23]

Similarly, the United States Supreme Court from its earliest time has recognized the bedrock principle that deprivations of law require remedies. In *Marbury v. Madison*, Chief Justice Marshall endorsed the common law requirement mandating a remedy for every wrong:

> [I]t is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded. . . . [F]or it is a settled and invariable principle in the laws of England, that every right, when withheld, must have a remedy, and every injury its proper redress.[24]

As the *Marbury* Court acknowledged, the right to a remedy is a core component of ordered liberty:

> The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection. . . . The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.[25]

> recognized that the Amendment's Due Process Clause, like its Fifth Amendment counterpart, "guarantees more than fair process." The Clause also includes a substantive component that "provides heightened protection against government interference with certain fundamental rights and liberty interests."

Troxel v. Granville, 530 U.S. 57, 65 (2000) (citations omitted).

21. *Cf.* Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997) (stating that Supreme Court identifies fundamental rights based on whether the right has been historically recognized or is central to the concept of ordered liberty).

22. Donald H. Zeigler, *Rights, Rights of Action, and Remedies: An Integrated Approach*, 76 WASH. L. REV. 67, 71 (2001) [hereinafter Zeigler, *Rights of Action*]. *See* Tracy A. Thomas, *Congress' Section 5 Power and Remedial Rights*, 34 U.C. DAVIS L. REV. 673, 689–90 (2001) (explaining that the notion of a remedy as a necessary part of any legal substantive right is not a new idea) [hereinafter Thomas, *Remedial Rights*].

23. Ashby v. White, 92 Eng. Rep. 126 (K.B. 1703).

24. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163–66 (1803) (quoting Blackstone's Commentaries).

25. *Id.* at 161, 163; *see also* United States v. Loughrey, 172 U.S. 206, 232 (1898)

Additional support for the historical presence of the right to a remedy is found in the state constitutions of three-fourths of the states which contain express remedial guarantees.[26] These guarantees requiring the right to a remedy in open court derive from Lord Coke's interpretation of the Magna Carta.[27] First appearing in the late 1700s, the state constitutional rights to a remedy were adopted to ensure the independence of the judiciary against corruption and control by the other political branches.[28] For example, in Ohio, the right to a remedy is a fundamental right guaranteed by the state constitution.[29] The Ohio Constitution provides: "All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay."[30] Ohio, like other states, has interpreted this provision to require, among other things, a "meaningful remedy."[31]

Furthermore, even assuming that the right to a remedy has not been historically recognized, it is a fundamental right that should be newly identified. Remedies perform two critical functions in the law: they define abstract rights and enforce otherwise intangible rights.[32] Rights standing alone are simply expressions of social values. It is the remedy that defines the right by making the value real and tangible by providing specificity and concreteness to otherwise abstract guarantees.[33] For example, in the school desegregation cases, the right was the right of school students to be given equal protection of the law.[34] The ordered

("The maximum *ubi jus*, *ibi remedium* lies at the very foundation of all systems of law.").

26. Donald H. Zeigler, *Rights Require Remedies: A New Approach to the Enforcement of Rights in the Federal Courts*, 38 HASTINGS L.J. 665, 677 n.68 (1987) [hereinafter Zeigler, *Rights Require Remedies*]; *see also* Thomas R. Phillips, *The Constitutional Right to a Remedy*, 78 N.Y.U. L. REV. 1309 (2003) (discussing state constitutional provisions guaranteeing one of the oldest Anglo-American rights of the right to obtain a remedy).

27. Phillips, *supra* note 26, at 1320; David Schuman, *The Right to a Remedy*, 65 TEMP. L. REV. 1197, 1199 (1992).

28. Shannon M. Roesler, Comment, *The Kansas Remedy by Due Course of Law Provision: Defining a Right to a Remedy*, 47 U. KAN. L. REV. 655, 656–59 (1999).

29. OHIO CONST. art. 1, § 16.

30. *Id.* (adopted in current form in 1851 based on similar law of 1802).

31. Sorrell v. Thevenir, 633 N.E.2d 504, 513 (Ohio 1994) (interpreting constitutional guarantee as encompassing the fundamental right to a "meaningful remedy" that provides satisfaction for injuries sustained); Gaines v. Preterm-Cleveland, Inc., 514 N.E.2d 709, 716 (Ohio 1987) ("Denial of a remedy and denial of a *meaningful* remedy lead to the same result: an injured plaintiff without legal recourse.").

32. Fiss, *Justice*, *supra* note 1; Gewirtz, *supra* note 1, at 587 (stating that remedies generally "give meaning to ideals" in order that they be "effective in the real world"); Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 885–97 (1999).

33. Thomas, *Remedial Rights*, *supra* note 22; Gewirtz, *supra* note 1.

34. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

remedies defined this right by providing meaningful contours to the right by prohibiting the racial assignment of students,[35] requiring integrated schools,[36] and redressing realities causally related to segregation.[37]

Without remedies, rights are mere ideals, promises, or pronouncements that may or may not be followed.[38] As Justice Holmes expressed, "Legal obligations that exist but cannot be enforced are ghosts that are seen in the law but are elusive to the grasp."[39] Like manners, rights simply become something that one should do, but not something that one is compelled to do. The enforcement power of the remedy is the quality that converts pronouncements of ideals into operational rights. It is this enforceability that makes something a legal rather than a moral or natural right.[40] As expressed in the Federalist Papers, the definition of a claim as a "legal" right depends upon the availability of this enforcement:

> It is essential to the idea of a law, that it be attended with a sanction; or, in other words, a penalty or punishment for disobedience. If there be no penalty annexed to disobedience, the resolutions or commands which pretend to be laws will, in fact, amount to nothing more than advice or recommendation.[41]

A remedy is thus the integral part of each right that is ultimately necessary to the effectuation of the rule of law. For without a remedy, judicial decisions are merely advisory opinions, hypothetical undertakings with no practical effect.[42] Without remedies, the law simply has no force

35. Green v. County Sch. Bd., 391 U.S. 430 (1968); Brown v. Bd. of Educ., 349 U.S. 294 (1955).

36. *Green*, 391 U.S. 430; Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).

37. These realities include causal contributors of segregation redressed by prophylactic measures and causal consequences redressed by reparative injunctions. *E.g.*, Milliken v. Bradley, 433 U.S. 267 (1977) (remedying educational deficiencies caused by segregation); *Swann*, 402 U.S. 1 (remedying housing segregation contributing to segregation by ordering quotas, busing, and redistricting); *see* Levinson, *supra* note 32, at 884–86 (describing how prophylactic remedies in the school desegregation context defined the right against de jure segregation to include the right against de facto segregation); Tracy A. Thomas, *The Prophylactic Remedy: Normative Principles and Definitional Parameters of Broad Injunctive Relief*, 52 BUFF. L. REV. 301, 372–79 (2004) (describing how prophylactic remedies respond to the definitional need to translate abstract rights).

38. Zeigler, *Rights Require Remedies*, *supra* note 26, at 678.

39. *Ex parte* United States, 257 U.S. 419, 433 (1922).

40. IREDELL JENKINS, SOCIAL ORDER AND THE LIMITS OF LAW 247–55 (1980); Zeigler, *Rights of Action*, *supra* note 22, at 72.

41. THE FEDERALIST NO. 15, at 159 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961).

42. Thomas, *Remedial Rights*, *supra* note 22, at 689–90.

in society. Individuals need not conform their behavior and established rights may simply be ignored.

The ultimate danger from court action that denies meaningful relief is that rights will be effectively nullified.[43] Our judicial system—both federal and state—is premised on the universally accepted principle that court judgments have meaning and that judicial pronouncements will be backed up by all necessary enforcement actions that may be required to ensure compliance with the law. "The essence of a right is, that it may be exercised contentiously, adversely. *Ubi jus ibi remedium*. . . . [Not that it be a mere] favor to be granted or withheld by any litigant."[44] The enforcement component of a remedy is its critical aspect that distinguishes it from an idea and actualizes the right in a tangible manner. As the Supreme Court stated in the 1838 case of *Kendall v. United States*:

> [T]he power to enforce the performance of the act must rest somewhere, or it will present a case which has often been said to involve a monstrous absurdity in a well organized government, that there should be no remedy, although a clear and undeniable right should be shown to exist.[45]

Neutralizing a right by eliminating its remedy and converting it into a mere description of favored behavior effectively nullifies the attendant right and deprives the courts of the ability to protect our legal rights.

II. SUPREME COURT ENDORSEMENT OF THE DUE PROCESS RIGHT TO A REMEDY

This normative description of the equitable principle of *ubi jus*, *ibi remedium* finds doctrinal grounding that elevates it above a mere maxim to the status of a legal entitlement. The Due Process Clause of the Fourteenth Amendment provides a basis for finding that the right to a remedy is a fundamental right which cannot be abridged absent compelling circumstances. This notion of a due process right to a meaningful remedy is supported by two strands of United States Supreme Court precedent in the disparate contexts of tax remedies and punitive damages.[46]

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43. [W]hile it is for the General Assembly to legislate a remedy, courts *do* possess the authority to enforce their orders, since the power to declare a particular law or enactment unconstitutional must include the power to require a revision of that enactment, to ensure that it is then constitutional. If it did not, then the power to find a particular Act unconstitutional would be a nullity.

DeRolph v. State, 728 N.E.2d 993, 1002 (Ohio 2000).

44. Florida v. Georgia, 58 U.S. (17 How.) 478, 481 (1854); *see also* Thomas, *Remedial Rights*, *supra* note 22, at 687–94.

45. Kendall v. United States, 37 U.S. (12 Pet.) 524, 624 (1838).

46. *See* State Farm Auto. Ins. Co. v. Campbell, 538 U.S. 408, 412 (2003); Reich v.

First, in the tax cases of *Reich v. Collins*, *Harper v. Virginia Department of Taxation*, and *McKesson Corp. v. Division of Alcoholic Beverages*, the Supreme Court has held that the Due Process Clause requires state courts to provide a successful plaintiff with a minimally adequate remedy that provides "meaningful" relief.[47] In these cases, the Court established a constitutional right to a meaningful remedy by requiring the retroactive remedy of a tax refund for a tax determined to be unconstitutional.[48] While a trial court has flexibility to choose among appropriate equitable and monetary remedies, it cannot, consistent with federal due process, select a remedy that fails to provide meaningful relief to the plaintiff.[49] In so holding, the Court established a constitutional floor entitling the plaintiff to a minimum of adequate relief.[50]

Second, in the punitive damages cases, the Supreme Court has found that arbitrary and unreasonable state court remedies violate the Due Process Clause.[51] These cases evaluating excessive state court remedies are grounded in the core concern of federal due process regarding the unreasonableness of state action. "This constitutional concern, itself harkening back to the Magna Carta, arises out of the basic unfairness of depriving citizens of life, liberty, or property, through the application, not of law and legal processes, but of arbitrary coercion."[52] Where state court remedies are arbitrary and unreasonable, the Court has found a violation of Due Process.[53] While the punitive damages cases address

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Collins, 513 U.S. 106, 109 (1994); Harper v. Va. Dep't of Taxation, 509 U.S. 86, 101–02 (1993); McKesson Corp. v. Div. of Alcoholic Beverages and Tobacco, 496 U.S. 18, 39 (1990); *see also* Webster v. Doe, 486 U.S. 592, 603 (1988) (denying judicial remedies for constitutional claims would raise a "serious constitutional question").

47. *Reich*, 513 U.S. at 108, 114; *Harper*, 509 U.S. at 100–02; *McKesson*, 496 U.S. at 31, 39.

48. Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1825 (1991).

49. *McKesson*, 496 U.S. at 39; *see also Harper*, 509 U.S. at 102 ("[Virginia] is free to choose which form of relief it will provide, so long as that relief satisfies the minimum federal requirements we have outlined. State law may provide relief beyond the demands of federal due process, but under no circumstances may it confine petitioners to a lesser remedy.") (citations omitted).

50. *See McKesson*, 496 U.S. at 39.

51. *Campbell*, 538 U.S. at 416; BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 568 (1996); Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 18 (1991).

52. *Campbell*, 538 U.S. at 416–17; *Gore*, 517 U.S. at 587 (Breyer, J., concurring); *see also Haslip*, 499 U.S. at 59 (O'Connor, J., dissenting) ("[T]he Due Process Clause does not permit a State to classify arbitrariness as a virtue. Indeed, the point of due process—of the law in general—is to allow citizens to order their behavior.").

53. *Campbell*, 538 U.S. at 419–20, 429; *Gore*, 517 U.S. at 584–86.

excessive remedies, their analytical foundation highlighting the right to a reasonable and non-arbitrary remedy under both substantive and procedural due process implicates deficient remedies as well.

The basic fairness guarantees of the Due Process Clause therefore mandate the right to a meaningful remedy.[54] A meaningful remedy is one that is minimally adequate and effective at ensuring the protection of the attendant right.[55] A meaningful remedy ensures a base minimum requiring some modicum of relief in a case beyond the simple statement of a violation of law.[56] It requires an adequate remedy that is satisfactory, although it need not be complete relief, or the plaintiff's preferred relief.[57] By definition, a "remedy" is limited to the confines of the case to redress wrongdoing by the identified defendants.[58] Yet working within those judicial confines, a meaningful remedy must be actualized—it must actually work to effectuate the purpose of the right.[59] The remedy must match the purpose of the declared right by returning the plaintiff to her rightful position[60] or keeping the government within the bounds of the law.[61]

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54. Reich v. Collins, 513 U.S. 106, 108, 114 (1994); *Harper*, 509 U.S. at 100–02; *McKesson*, 496 U.S. at 31, 39.

55. Smith v. Robbins, 528 U.S. 259, 276–77 (2000) (holding that an adequate remedy is one that "reasonably ensures" the protection of a right). Where Congress has created the right by statute, it may also designate the correlative "adequate" remedy. Thomas, *Remedial Rights*, *supra* note 22, at 754–66. The courts will generally defer to the legislative remedy for a statutory right as long as it provides some minimally adequate relief. *Id.*; *e.g.*, Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 284 (1998). This is because Congress has the greater power to eliminate the right and therefore may take the lesser restrictive measure of narrowing the definition of the statutory right through the assigned remedy. Thomas, *Remedial Rights*, *supra* note 22, at 756–57.

56. *Harper*, 509 U.S. at 101–02; *cf.* U.C.C. § 2-719 (1963) (stating that liquidated damages are not a minimally adequate substitute for general contract damages if they fail to provide a fair quantum of relief). This was the heart of the issue in *DeRolph* where the Ohio Supreme Court failed to provide even the most minimal relief by prohibiting all remedies and instead concluding the case with only a statement of the violation of law. *DeRolph V*, 789 N.E.2d 195, 195–96 (Ohio 2003), *cert. denied*, DeRolph v. Ohio, 124 S. Ct. 432 (2003).

57. *Harper*, 509 U.S. at 102; Thomas, *Remedial Rights*, *supra* note 22, at 761.

58. Milliken v. Bradley, 418 U.S. 717, 752–53 (1974) (reversing injunctive relief ordering suburbs to assist in desegregation of Detroit city schools where the suburbs were not named in the lawsuit or implicated in the segregative wrongdoing).

59. Thomas, *Remedial Rights*, *supra* note 22, at 764.

60. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 410 (1971) (Harlan, J., concurring) (awarding damages for violation of plaintiff's Fourth Amendment rights, in part, because "[i]t will be a rare case indeed in which an individual in Bivens' position will be able to obviate the harm by securing injunctive relief from any court. . . . For people in Bivens' shoes, it is damages or nothing"); *Harper*, 509 U.S. at 100–02 (finding denial of a meaningful remedy where court issued injunction against future unconstitutional taxation rather than awarding compensatory damages to plaintiff who had already paid illegal tax).

61. Fallon & Meltzer, *supra* note 48, at 1736 (arguing that remedies are required to

III. STRICT SCRUTINY FOR THE DENIAL OF THE FUNDAMENTAL RIGHT TO A REMEDY

As a fundamental right, however, the right to a remedy can still be denied if that denial is necessary to a compelling state interest.[62] State action that abridges a fundamental right, including the right to a remedy, is subjected to strict scrutiny analysis that balances the interests of the state against the fundamental interest. Strict scrutiny analysis thus provides a calculus through which courts can assess the denial of remedy which sometimes occurs, for example, in the instance of sovereign immunity.[63] This result, however, of the restriction of a remedy in exceptional situations does not negate the existence of the fundamental right to a remedy, as Justice Scalia has suggested; instead, the exceptions support the existence of such a right.[64]

Justice Scalia, dissenting from the decision in *Webster v. Doe*,[65] argued: "In sum, it is simply untenable that there must be a judicial remedy for every constitutional violation."[66] He supported this conclusion with examples of the unavailability of relief due to sovereign immunity, political question, and the public interest.[67] However, these contextual examples can be explained as the routine operation of strict

keep government officials within the bounds of the Constitution); Alden v. Maine, 527 U.S. 706 (1999) (discussing the necessity of injunctive relief to make government conform to the standards of the federal constitution).

62. *Cf.* Roe v. Wade, 410 U.S. 113, 163 (1973) (stating in dicta that the compelling interest of viability of fetus justifies restriction of abortion at later stages of pregnancy even under strict scrutiny); Burson v. Freeman, 504 U.S. 191, 211 (1992) (holding that ban on electioneering within 100 feet of polling place denying fundamental right to free speech survives strict scrutiny); Zablocki v. Redhail, 434 U.S. 374, 392 (1978) (Stewart, J., concurring) (stating that application of strict scrutiny analysis to denial of fundamental right to marry would still validate state restrictions on marriage due to age or relation).

63. Fallon & Meltzer, *supra* note 48, at 1778; Gewirtz, *supra* note 1, at 602 (arguing that competing costs should not be excluded completely from the remedial calculus and that the calculus must assess the extent to which other social interests should play a role in limiting plaintiff's remedies).

64. Webster v. Doe, 486 U.S. 592, 613 (1988) (Scalia, J., dissenting); *see also* Zehner v. Trigg, 952 F. Supp. 1318, 1329 (S.D. Ind. 1997) (agreeing with Justice Scalia's argument that the existence of sovereign immunity proves that there is no right to an individualized remedy).

65. In *Webster*, the Supreme Court held that judicial review must lie for a plaintiff's colorable claims of employment discrimination based on his homosexuality. 486 U.S. at 603–04. In so doing, the majority of the Court recognized that remedies must be available to enforce important constitutional rights. *Id.*

66. *Id*. at 613.

67. *Id.* at 612–13.

scrutiny for fundamental rights. The example of political question is distinguishable because in those cases the court does not have a cognizable legal right that the judiciary is competent to declare.[68] Without a right declared by the court, there is no right or need for a remedy.[69] The other examples Justice Scalia identifies are simply examples of compelling interests that in some cases have trumped the fundamental right to a remedy. In some cases, there exist countervailing constitutional commands, such as in the case of the Eleventh Amendment's guarantee of state sovereign immunity.[70] In other cases, there are important historical and structural policies such as federalism, national security, and presidential immunity that have been found to outweigh the right to a remedy.[71]

However, applying an express strict scrutiny analysis might in fact alter some of the balancing decisions the Court has previously made resulting in the denial of remedies.[72] For example, the Court has denied remedies for past constitutional violations when declaring new law in the case.[73] These retroactivity cases suggest the kind of balancing of compelling state interests against the plaintiff's fundamental right to a remedy reminiscent of a strict scrutiny type analysis.[74] Yet, the significance and determinative weight of the interest might change when subjected to strict scrutiny as opposed to an equitable balancing test. For example, the concerns supporting the official immunity retroactivity decisions of deterring public service and proliferating public lawsuits

68. Similarly, the explicit constitutional prohibitions on judicial remedies in Article I, sections 5 and 6 of the U.S. Constitution cited by Justice Scalia, that the House is judge of the election of its members and the prohibition on questioning any speech or debate of Congress, are situations where there is no legal right for the court to declare or remedy. *See id*. at 612.

69. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170–71 (1803).

70. Gewirtz, *supra* note 1, at 603.

71. *See, e.g.*, *Webster*, 486 U.S. at 604–06 (opinion of Court and O'Connor, J., concurring) (suggesting national security issues might trump the plaintiff's right to a remedy for employment discrimination by the CIA); Nixon v. Fitzgerald, 457 U.S. 731, 768–69 (1982) (White, Brennan, Marshall, Blackmun, J.J., dissenting) (stating that absolute immunity of president bars remedy that is otherwise required under *Marbury*).

72. *See* McKesson Corp. v. Div. of Alcoholic Beverages and Tobacco, 496 U.S. 18, 44 (1990) ("The Florida Supreme Court cites two 'equitable considerations' as grounds for providing petitioner only prospective relief, but neither is sufficient to override the constitutional requirement that Florida provide retrospective relief . . . .").

73. Fallon & Meltzer, *supra* note 48, at 1733; *see, e.g.*, Harlow v. Fitzgerald, 457 U.S. 800, 813–14 (1982) (using doctrine of qualified immunity to shield officials from damages liability whenever the plaintiff relies on new law); Am. Trucking Ass'ns, Inc. v. Smith, 496 U.S. 167, 194 (1990) (denying retroactive relief of tax refund to plaintiff based on new law of unconstitutionality of tax articulated in case).

74. *Cf. American Trucking*, 496 U.S. at 194 ("Once a constitutional decision applies and renders a state tax invalid, due process, not equitable considerations, will generally dictate the scope of relief offered.").

might not rise to the level of a "compelling" interest on the level of a constitutional command as seen in the Eleventh Amendment immunity.[75] Or the concern with fairness in imposing consequences for new law, such as that supporting the Court's denial of a *McKesson* tax refund remedy in *American Trucking Ass'ns, Inc. v. Smith*,[76] might not suffice as a compelling interest outweighing the fundamental right to a remedy, as the four dissenting Justices in *American Trucking* recognized.[77] At the very least, the strict scrutiny analysis provides the courts with a clear calculus through which to resolve these remedial decisions and weigh important interests that compete against the right to a remedy.[78]

Thus, the exceptional cases in which a remedy is denied weave into a legal justification for the fundamental right to a remedy under Due Process. Rather than denying the existence of a right to a remedy, these instances confirm that meaningful remedies are fundamentally required, absent some compelling competing interest.

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Through its remedial opinion and example, *Brown* signified the beginning of the understanding of the power of injunctive remedies. As this paper has argued, *Brown's* legacy therefore reaches beyond the confines of its school segregation setting into all areas of law through its establishment of this remedial norm. Embedding this norm into constitutional jurisprudence will ensure that *Brown's* legacy is not lost to the future.

75. *See* Fallon & Meltzer, *supra* note 48, at 1749, 1820.

76. *American Trucking*, 496 U.S. at 183 (denying remedy due to retroactivity concerns that would produce "substantial inequitable results" of burdening the State's operations and acting against the state's reliance interests). The plurality opinion in *American Trucking* seemed to equate its decision denying relief to the plaintiff on retroactivity grounds with the political question type denial of relief (discussed *supra* in text accompanying notes 67–68) in which the plaintiff does not have a substantive right for the court to remedy. *See id.* at 195.

77. *Id.* at 224.

78. *See* Fallon & Meltzer, *supra* note 48, at 1778–79 (suggesting the use of the law of remedies to provide a calculus to make sense of the retroactivity cases); *cf. American Trucking*, 496 U.S. at 171 (in which the absence of a clear analysis produced a split decision as to whether retroactivity concerns trumped fundamental right to a remedy).